

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

**SUMMARY ORDER**

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals  
for the Second Circuit, held at the Daniel Patrick Moynihan  
United States Courthouse, 500 Pearl Street, in the City of  
New York, on the 2<sup>nd</sup> day of May, two thousand eight.

**PRESENT:**

HON. JOSEPH M. McLAUGHLIN,  
HON. JOSÉ A. CABRANES,  
HON. ROBERT D. SACK,  
*Circuit Judges.*

\_\_\_\_\_  
MING HUA CHEN,  
*Petitioner,*

v.

\_\_\_\_\_  
MICHAEL B. MUKASEY, ATTORNEY GENERAL,<sup>1</sup>  
*Respondent.*

07-1612-ag  
NAC

<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Michael B. Mukasey is automatically substituted for former Attorney General Alberto R. Gonzales as the respondent in this case.

1     **FOR PETITIONER:**             **Lin Li, New York, New York.**

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3     **FOR RESPONDENT:**           **Jeffrey S. Bucholtz, Acting**  
4                                   **Assistant Attorney General, James A.**  
5                                   **Hunolt, Senior Litigation Counsel,**  
6                                   **John W. Blakeley, Attorney, Office**  
7                                   **of Immigration Litigation, U.S.**  
8                                   **Department of Justice, Washington,**  
9                                   **D.C.**

10  
11           UPON DUE CONSIDERATION of this petition for review of a  
12     decision of the Board of Immigration Appeals ("BIA"), it is  
13     hereby ORDERED, ADJUDGED, AND DECREED, that the petition for  
14     review is GRANTED in part and DISMISSED in part.

15           Petitioner Ming Hua Chen, a native and citizen of the  
16     People's Republic of China, seeks review of an April 3, 2007  
17     order of the BIA dismissing his appeal on remand from this  
18     Court. *In re Ming Hua Chen*, No. A76 280 025 (B.I.A. Apr. 3,  
19     2007). We assume the parties' familiarity with the  
20     underlying facts and procedural history of the case.

21           As a preliminary matter, because Chen failed to raise  
22     before the BIA his claim that he has a well-founded fear of  
23     persecution in China because he has two U.S. citizen  
24     children, we lack jurisdiction to consider that claim and  
25     dismiss the petition for review to that extent. See 8  
26     U.S.C. § 1252(d)(1); *Karaj v. Gonzales*, 462 F.3d 113, 119  
27     (2d Cir. 2006). Additionally, because Chen failed to

1 challenge the BIA's denial of his claim based on his  
2 partner's forced abortion, we deem any such argument to have  
3 been waived. *Yueqing Zhang v. Gonzales*, 426 F.3d 540, 545  
4 n.7 (2d Cir. 2005).

5 When the BIA issues its own opinion, "the opinion  
6 becomes the basis for judicial review." See *Yan Chen v.*  
7 *Gonzales*, 417 F.3d 268, 271 (2d Cir. 2005). We review *de*  
8 *novo* questions of law and the application of law to  
9 undisputed fact. See, e.g., *Secaida-Rosales v. INS*, 331  
10 F.3d 297, 307 (2d Cir. 2003). We review the agency's  
11 factual findings under the substantial evidence standard,  
12 treating them as "conclusive unless any reasonable  
13 adjudicator would be compelled to conclude to the contrary."  
14 8 U.S.C. § 1252(b)(4)(B); see also *Manzur v. U.S. Dep't of*  
15 *Homeland Sec.*, 494 F.3d 281, 289 (2d Cir. 2007). However,  
16 we will vacate and remand for new findings if the agency's  
17 reasoning or fact-finding process was sufficiently flawed.  
18 *Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 406 (2d  
19 Cir. 2005); *Tian-Yong Chen v. INS*, 359 F.3d 121, 129 (2d  
20 Cir. 2004).

21 We find that the BIA erred in concluding that there is  
22 "no evidence" that Chen resisted China's coercive population

1 control program. See *Zhou Yun Zhang v. INS*, 386 F.3d 66, 73  
2 n.7 (2d Cir. 2004) overruled in part on other grounds by *Shi*  
3 *Liang Lin v. U.S. Dept. of Justice*, 494 F.3d 296, 305 (2d  
4 Cir. 2007) (en banc). Indeed, Chen testified that when his  
5 "wife" did not appear for her scheduled abortion, "birth  
6 control officers brought some people to go to [his] mother-  
7 in-law's home" in order to try to arrest her. When Chen  
8 heard an argument and went to see what was happening, he saw  
9 people he did not recognize trying to take his mother-in-  
10 law's television, radio, and furniture. He testified,  
11 however, that he thought at least one of these individuals  
12 was a "birth control officer." During this incident, Chen  
13 pushed that individual to the ground. As a result, he was  
14 beaten "for a long time," and threatened that "if [he did]  
15 not bring [his] wife out . . . they [were] going to ask the  
16 public security to arrest [him] and put [him] in prison."

17 Based on Chen's testimony, it is unclear why the BIA  
18 held that there was "no evidence" that the incident at  
19 Chen's mother-in-law's house was related to Chen's  
20 resistance to China's coercive family planning policy. See  
21 *Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 406 (2d  
22 Cir. 2005). Thus, the record was not "adequately developed"  
23 with respect to Chen's other resistance claim. See *Gui Yin*

1     *Liu v. INS*, 508 F.3d 716, 723 (2d Cir. 2007) (remanding to  
2     the BIA in order for the petitioner's claim to be  
3     "adequately developed"); see also *Matter of S-L-L-*, 24 I. &  
4     N. Dec. 1, 10 (BIA 2006) (en banc). On remand, the agency  
5     should provide a more reasoned analysis of whether the  
6     incident Chen described is sufficient evidence of his  
7     "resistance," and whether, assuming such resistance, Chen  
8     suffered past persecution or has a well-founded fear of  
9     persecution on account of that resistance. See 8 U.S.C. §  
10    1101(a)(42).

11           For the foregoing reasons, the petition for review is  
12    GRANTED in part and DISMISSED in part, the BIA's decision is  
13    VACATED in part, and the case is remanded for further  
14    proceedings consistent with this order. As we have  
15    completed our review, any stay of removal that the Court  
16    previously granted in this petition is VACATED, and any  
17    pending motion for a stay of removal in this petition is  
18    DISMISSED as moot. Any pending request for oral argument in  
19    this petition is DENIED in accordance with Federal Rule of  
20    Appellate Procedure 34(a)(2), and Second Circuit Local Rule  
21    34(d)(1).

22                           FOR THE COURT:  
23                           Catherine O'Hagan Wolfe, Clerk  
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25                           By: \_\_\_\_\_  
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